



DEFENSE LOGISTICS AGENCY  
HEADQUARTERS  
8725 JOHN J. KINGMAN ROAD, SUITE 2533  
FORT BELVOIR, VIRGINIA 22060-6221

IN REPLY  
REFER TO

J-33

PROCLTR 03- 18

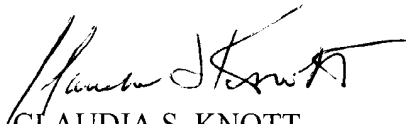
**OCT 23 2003**

MEMORANDUM FOR PROCLTR DISTRIBUTION LIST

SUBJECT: Defense Logistics Acquisition Directive (DLAD) 4105.1, Domestic Non-Availability Determinations, Subpart 90.17

This PROCLTR provides new DLAD guidance regarding documentation requirements when requesting a Domestic Non-Availability Determination (DNAD) be approved. DLAD 90.1700 provides procedural guidance for requesting Under Secretary of Defense (Acquisition, Technology and Logistics) approval of Berry Amendment waivers as required by DLAD Subsection 25.7002. Additional guidance at 90.1701 will assist the contracting activities to minimize potential violations or address post award violations of the Berry Amendment.

This PROCLTR is effective immediately and remains in effect until it is incorporated into the electronic DLAD. The point of contact is Ms. Catherine Heretick, J-3312, who can be reached at (703) 767-1361 or via email to [catherine.heretick@dla.mil](mailto:catherine.heretick@dla.mil).

  
CLAUDIA S. KNOTT  
Senior Procurement Executive

Attachment



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SUBPART 25.70 - AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER STATUTORY  
RESTRICTIONS ON FOREIGN PURCHASES

25.7002 Restriction on food, clothing, fabrics, and specialty metals.

25.7002-2 Exceptions.

(a) All domestic non-availability determination approval requests made pursuant to 10 U.S.C. 2533a, also known as the Berry Amendment, shall be forwarded to the DLA Senior Procurement Executive for submission to the Under Secretary of Defense (Acquisition, Technology & Logistics) for approval. Options not exercised at time of award require a separate non-availability determination. (See DLAD 90.17)

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SUBPART 90.17 - DOMESTIC NON-AVAILABILITY DETERMINATIONS

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90.1700 Requirement.  
90.1701 Minimizing Berry Amendment Violations.

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SUBPART 90.17 DOMESTIC NON-AVAILABILITY DETERMINATIONS

90.1700 Requirement

(a) The Berry Amendment requires designated items be of domestic origin, domestic content, and be manufactured in the United States or its possessions unless an exception applies or unless a determination is made that the product cannot be acquired as and when needed in satisfactory quality and sufficient quantity at U.S. market prices. This general requirement applies to any item of food, clothing, tents, tarpaulins, covers, cotton, and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics, canvas products, or wool, certain items of individual equipment, specialty metals including stainless steel flatware, or hand or measuring tools grown, reprocessed, reused, or produced in the United States or its possessions, unless the Under Secretary for Defense (Acquisition, Technology, & Logistics) (USD(AT&L)) grants a domestic non-availability determination (DNAD).

(b) When a contracting activity receives a requirement for an item covered by the Berry Amendment for which no exception exists, a formal DNAD request must be submitted to HQ DLA (J-3312). Contracting activities must first route DNADs through local coordination and review channels. HQ DLA will review the DNAD request, obtain appropriate coordination, and forward it to USD(AT&L) for approval. The contracting activity should submit the DNAD package 4 to 6 months before it is needed. Also, if the domestic non-availability is anticipated to be permanent and no alternatives are possible, the field activity should separately prepare a corresponding FAR case for a permanent waiver request to add the item to FAR 25.104, Nonavailable articles, and include reference to that case in the Determination and Finding document, and the Report and Recommendation of the Contracting Activity. A DNAD package consists of:

(1) *Determination and Findings (D&F)*: This document must concisely focus on the specifics for concluding the item is unavailable domestically. This document must be summary in nature, be no longer than 2 pages, and be prepared with the Times New Roman 13 point font. Further relevant and supporting details must be included in the Report and Recommendation of the Contracting Activity Commander. The D&F must:

- (i) Cite the decision maker's authority as specified in the Berry Amendment.
- (ii) Identify the articles or items (or class of items, if applicable) being procured and their domestic availability status.
- (iii) Discuss current market research results (e.g., market research has not revealed any domestic sources.) A more detailed discussion of the market research

efforts and results can be presented in the Report and Recommendation of the Contracting Activity Commander.

(iv) Identify the total quantity (including readiness quantities) to be procured and length of time the waiver is needed (e.g., period of contract performance).

(v) Address the DEPSECDEF requirement that the contracting activity offered the customers alternatives not requiring a Berry Amendment waiver, and the customers' certified responses.

(2) The contracting activity's letter to the requiring activity (and all other branches of the services that use the item) advising: 1) that the required item requires a waiver to the Berry Amendment; and, 2) of alternatives that do not require a waiver under the Berry Amendment.

(3) The requiring activity's written response (and written responses from other branches of the Military services that use that item, as applicable), certifying that the proposed alternatives are unacceptable. The responses must be signed by an individual with the authority to approve use of an alternate item for the service(s).

(4) Report and Recommendation of the Contracting Activity Commander. This document should be signed by the Commander of the Contracting Activity (or individual acting in that capacity). It provides for a more comprehensive and lengthy discussion of the facts than the DNAD. There is no limit on the length of the Report and Recommendation of the Activity Commander. This report should describe in reasonable detail:

(i) The supply and procurement situation; the contractor's commercial practices; any special or unusual circumstances; results of market research conducted and constraints, if any; the reasonable conclusions drawn; exchanges between engineering support activities and customers concerning the possible existence of alternative items that do not require a Berry Amendment waiver. Attach copies of market research related documents and any other records, and letters from contractors that explain why they are unable to either obtain the product domestically or identify the source of their product or components (more relevant for prime vendor procurements), as appropriate.

(ii) Potential political ramifications, Congressional involvement, morale issues, small business concerns, mission failure, troop support issues, etc., as appropriate. The discussion must include a procurement impact statement that describes the outcome if the DNAD is not approved.

(iii) The activity commander must certify, in writing, satisfaction that the customer explored all reasonable alternatives and that such alternatives were unacceptable.

(c) The contracting activity will provide a copy of their Executive Summary to J-3312. A DNAD package will be assembled for the HQ DLA Senior Procurement Executive's (SPE) submission to the USD(AT&L). HQ DLA (J-3312) will staff the DNAD package for coordination with DLA Acquisition Policy Branch (J-3311), and DLA Office of General Counsel (DLA-DG), and DLA Office of Small & Disadvantaged Business Utilization (DLA-DB), and process for SPE signature.

(d) Once the DLA SPE signs the DNAD package, it will be forwarded to USD(AT&L), through the Principal Deputy Under Secretary of Defense (AT&L), the Director, Defense Procurement and Acquisition Policy, and Deputy Under Secretary of Defense (Logistics and Materiel Readiness). USD(AT&L) will approve or disapprove the DNAD request and advise the DLA SPE of the decision. The DLA SPE will then advise the contracting activity of the USD(AT&L) decision.

(e) For each DNAD that is granted, the contracting activity is required to submit an annual report in accordance with DLAD 25.7002-2(b), Exceptions.

#### 90.1701 Minimizing Berry Amendment violations.

(a) DLA contractors are becoming aware of the increased attention and visibility that the Berry Amendment domestic source restrictions are receiving, and of the restrictions imposed by this statute, and the DFARS implementing guidance. This heightened awareness has resulted in a number of contractors notifying DLA of their violation of this statute and requesting DLA grant a "waiver."

(b) Identification of potential violations after contract award presents considerable difficulties for DLA. Once aware of a violation, DLA is presented with the challenge of not accepting the non-conforming end item(s) pending waiver consideration in order to ensure no Anti-Deficiency Act (ADA) violation occurs. This not only can result in delayed delivery to the customer, it also may place the contractor in an untenable financial position. To minimize the impact, the affected contracting activity must quickly analyze the market to verify that no domestic source is available and prepare a DNAD. This DNAD must be fully staffed within both the contracting activity and DLA HQ before submission to USD(AT&L) for approval consideration (numerous OSD offices must also review/ coordinate prior to a USD(AT&L) decision). Additionally, external pressures (e.g., small business status, Congressional interest) are often present in such situations.

(c) The following preaward steps should serve to minimize potential Berry Amendment violations after contract award. While the potential use of the suggestions below may depend on the size and complexity of the procurement, the suggestions provide a guide for your use.

(i) Pre-Proposal Conference: If a Berry Amendment covered item is to be procured and a pre-proposal conference held, the domestic source restrictions of the Berry Amendment should be highlighted to the attendees. This highlights the importance to the attendees, and allows for the correction of misunderstandings (e.g., different from the Buy American Act).

(ii) Full Text Clause Inclusion: The Berry Amendment is implemented by DFARS clause 252.225-7012 (252.225-7014 for specialty metals and 252.225-7015 for hand or measuring tools). Many activities incorporate these clauses by reference which requires the contractor to actively research the content of the clause. While it is the responsibility of the contractor to adequately understand all solicitation requirements, including the contents of 252.225-7012/7014/7015, the statutory background of the clause, the heightened attention compliance with the clause is receiving, and the significant difficulties non-compliance presents makes the clause an ideal candidate for full text inclusion in the solicitation.

(iii) Plain Language: The development and inclusion in solicitations of "plain language" that spells out the Berry Amendment domestic source restrictions is a consideration. However, such language must be used with caution and must have HQ DLA approval. Subtle changes in the wording of the domestic source restrictions could be legally and contractually misinterpreted by the contractor, causing conflict with the exact requirements of the clauses at DFARS 252.225-7012/7014/7015. Any such "plain language" wording would need to have significant legal review to confirm that nothing in the developed wording modifies the requirements of the clauses (as interpreted by GAO cases, etc.) levied upon the contractor. Additionally, the "plain language" should only address the part of the Berry Amendment that applies to the commodity being solicited.

(iv) Mandatory Discussion Item: When negotiated procurements are conducted for Berry Amendment covered items, domestic source restrictions as identified in DFARS 252.225-7012/7014/7015 should be a mandatory discussion item with the contractor. Contractors should be asked to confirm their understanding of the requirement in the documentation submitted with their final proposal revisions or other submitted documentation.

(v) Preaward Surveys: If a preaward survey is required in accordance with FAR 9.106, the contracting activity should consider requesting the survey to also confirm the prospective contractor's ability to trace the origin of materials incorporated into the end product being acquired.

(vi) Evaluation Factor: The contracting activity can consider whether use of an evaluation factor that determines the contractor's ability to verify the source of materials is appropriate. Such a factor would most likely be a technically acceptable/unacceptable rating. Additionally, such a factor should be used judiciously, considering the complexity of the manufacturing process and size of the procurement so as not to unduly burden less "at risk" procurements.

(vii) Additional considerations: The development or use of a formal contractor certification verifying compliance with the requirements of the Berry Amendment is not authorized. The actions highlighted above should provide sufficient contractor awareness and Government assurance of contractor knowledge of Berry Amendment domestic source restrictions.

(d) Post award actions relative to the domestic source restrictions of the Berry Amendment fall into 2 general categories: 1) actions that may be taken to ensure continued contractor compliance during contract performance; and 2) action that should be taken once a potential Berry Amendment violation is detected. Although it is clearly the performing contractor's responsibility to ensure full compliance with all contract requirements, including the Berry Amendment restrictions specified in DFARS 252.225-7012/7014/7015, DLA can take reasonable steps, where appropriate, to validate the contractor's continuing Berry Amendment compliance. Such actions may reduce the potential for violations during performance. Violations detected during performance could result in Government non-acceptance of materials, delaying support to the warfighter, and non-payment to the contractor for the non-conforming items.

(e) Potential actions to ensure continued contractor compliance include:

(i) Berry Amendment compliance should be a discussion item at post award conferences.

(ii) The Defense Contract Management Agency (DMCA) is delegated responsibility to review, approve or disapprove, and maintain surveillance of the contractor's purchasing system per FAR 42.302(a)(50). The contracting activities should consider requesting additional on-going DCMA emphasis of the contractor purchasing system's ability to implement domestic source restrictions, and continuing verification of such through random records audits, etc.

(iii) Prime vendor (PV) contracts present a unique challenge due to the multitude of parts and supplies that are frequently involved. The opportunity for Berry Amendment violations is even greater because of the commerciality of the products provided under these contracts. Contracting activities should consider developing contract provisions that require the PV contractor to periodically assess their suppliers' compliance with Berry Amendment domestic source restrictions. The nature and extent of the provisions would depend upon the particulars (i.e., number of items under contract, length of period of performance, extent that supplies to be provided are subject to Berry Amendment restrictions, etc.). Potential alternatives include periodic (e.g., quarterly) review of a certain percentage of total items under contract. The review could be as straightforward as the PV contractor sending the suppliers a standardized sheet explaining the restrictions of the Berry Amendment and requiring the supplier to notify the prime contractor of any potential violation. The supplier could also be required to acknowledge receipt of the document by signing and returning it to the prime.

(f) Actions taken after contractor notification of a potential Berry Amendment violation:

(i) Verification: Ensure the item in question is subject to the restrictions of the Berry Amendment. Direct the contractor to positively determine the origin of the item in question.

(ii) Suspend Government acceptance: The Government, in accordance with FAR 46.407, should not accept items that have non-domestic content in violation of the Berry Amendment. Continued Government acceptance without the required DNAD could create an ADA violation. The contracting activity should consider the issuance of a stop work order pending resolution of the violation. Allowing the contractor to continue performance after notification of the violation could subject the Government to additional claimed contract costs and further exacerbate the violation.

(iii) Suspend Payment: The contracting activity should ensure Defense Finance and Accounting Service does not issue payment for non-conforming products nor make any new unauthorized progress payments pending resolution.

(iv) Market Research: Determine whether the item in question has a domestic source available.

(v) Substitute Product: For those items where it is subsequently determined a domestic source is not available, contracting activities should coordinate the potential use of an alternate item (e.g., synthetic fiber vs. goat hair) with the technical specification office of primary responsibility.